



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

SK/JMH
F.#2013R00948

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March 3, 2017

By Hand and ECF

The Honorable Joseph F. Bianco
United States District Judge
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: United States v. Phillip Kenner and Tommy Constantine
Criminal Docket No. 13-607 (JFB)

Dear Judge Bianco:

The government respectfully requests leave to submit this brief response to defendant Constantine's March 1, 2017, filing of exhibits in support of his supplemental post-trial motion for a new trial ("the Motion"). None of the exhibits proffered by Constantine constitute "new evidence" as he claims.

In his Motion, Constantine argued that the September 2016 civil deposition testimony of James Grdina constituted "new evidence" that undermined Grdina's June 2015 criminal trial testimony. See ECF 407. In its opposition, the government argued, inter alia, that Grdina's civil deposition testimony merely summarized documents that were not new, were available at trial, and that, in any event, were not produced in support of the Motion. At oral argument, Constantine sought leave to file the documents by February 22, 2017. On March 1, 2017, Constantine filed "the exhibits related to the Grdina deposition." ECF No. 458. A review of these materials confirms that they do not constitute "new evidence" and were equally available at the criminal trial. Specifically:

- Exhibit 1: This check from Constantine Management Group to Constantine's attorney Todd Lockwood was available to Constantine at trial as it dates back to September 29, 2006, came from Constantine's bank account, and was produced by the government in discovery with bates number BNK-BOA-00000210.

- Exhibit 2: This email from a representative of Stewart Title (and the pdf it attaches) was available to Constantine at trial as it dates back to June 3, 2008, and came from Constantine's email account. In addition, the pdf attachment was produced by the government in discovery with bates numbers LV-00000655, LV-00000700, and LV-00001561 to LV-00001567.
- Exhibits 3 and 4: These emails from Kenner to Constantine were available to Constantine at trial as they date back to January 25, 2007, and came from Constantine's email account.
- Exhibit 5: This email from a representative of Palms Place (and the attachments it references) was available to Constantine at trial as it dates back to August 18, 2009, and came from Constantine's email account.
- Exhibits 6 and 7: These schedules relating to deposits made on Palms Place units were available to Constantine at trial as they reflect the financial status of various Palms Place condominium units before two of the units were resold to non-Constantine entities in 2010 and 2013, see GX-3503 and GX-3504, and therefore the schedules pre-date the trial. Indeed, it appears that both schedules were emailed to Constantine in August 2009. See ECF No. 458-5 at 2. Moreover, Exhibit 7 was produced by the government in discovery with bates number LV-00001560 and admitted as a trial exhibit as GX-4408.
- Exhibits 8 and 9: These are merely excerpts of trial testimony.
- Exhibits 10, 11, and 12: These contracts and correspondence relating to Palms Place condominium units were available to Constantine at trial as they date back to 2005 to 2008, were either signed by Constantine or sent to him, and were produced by the government in discovery with bates numbers LV-00000623 to LV-00000668, LV-00000395 to LV-00000444, and LV-00000581 to LV-00000621, respectively.
- Exhibits 13 and 14: The Kenner financial statement from February 2006 was available to Constantine at trial, was produced by the government in discovery as bates number 19593 on Harvey Disk 2, and a substantially similar document – with identical entries as it pertains to the Palms – was admitted as a trial exhibit as GX-3513. The remaining bank documents from First Source Bank were available to Constantine at trial as they were produced by the government in discovery with bates numbers BNK-SOURCE-00001461 to BNK-SOURCE-00001468, and the Kenner

financial statement from October 2005 was admitted as a trial exhibit as GX-4231.

- Exhibit 15: This Kenner financial statement was available to Constantine at trial as it dates back to November 2005 and is substantially similar to the above-referenced financial statements admitted as trial exhibits GX-3513 and GX-4231.

The government notes that none of the above exhibits were marked or identified during the Grdina deposition. The only exhibit marked during the deposition was a Northern Trust bank statement, which was not included with the exhibits that Constantine filed with the Court in support of his Motion. See ECF No. 407-1 at 3. Nevertheless, it is apparent from the context of the deposition that the aforementioned bank statement was also available to Constantine at trial and admitted as a trial exhibit. See ECF No. 407-1 at 12; cf. GX-2102 at NAAZ000539 to NAAZ000540.

Respectfully submitted,

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